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SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 1049

FEDERAL DEPOSIT INSURANCE CORPORATION,
Receiver of the Parksley National Bank,
Petitioner,

vs.

S. C. WHITE, A. J. REW, G. WALTER MAPP, EMMA P. PARSONS, C. B. ROSS, S. F. PARKS, and J. BROOKS MAPP and MARGARET BELL CHANDLER, Administrators of the Estate of John W. Chandler,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF S. C. WHITE, A. J. REW, G. WALTER MAPP AND J. BROOKS MAPP AND MARGARET BELL CHANDLER, ADMINISTRATORS OF THE ESTATE OF JOHN W. CHANDLER.

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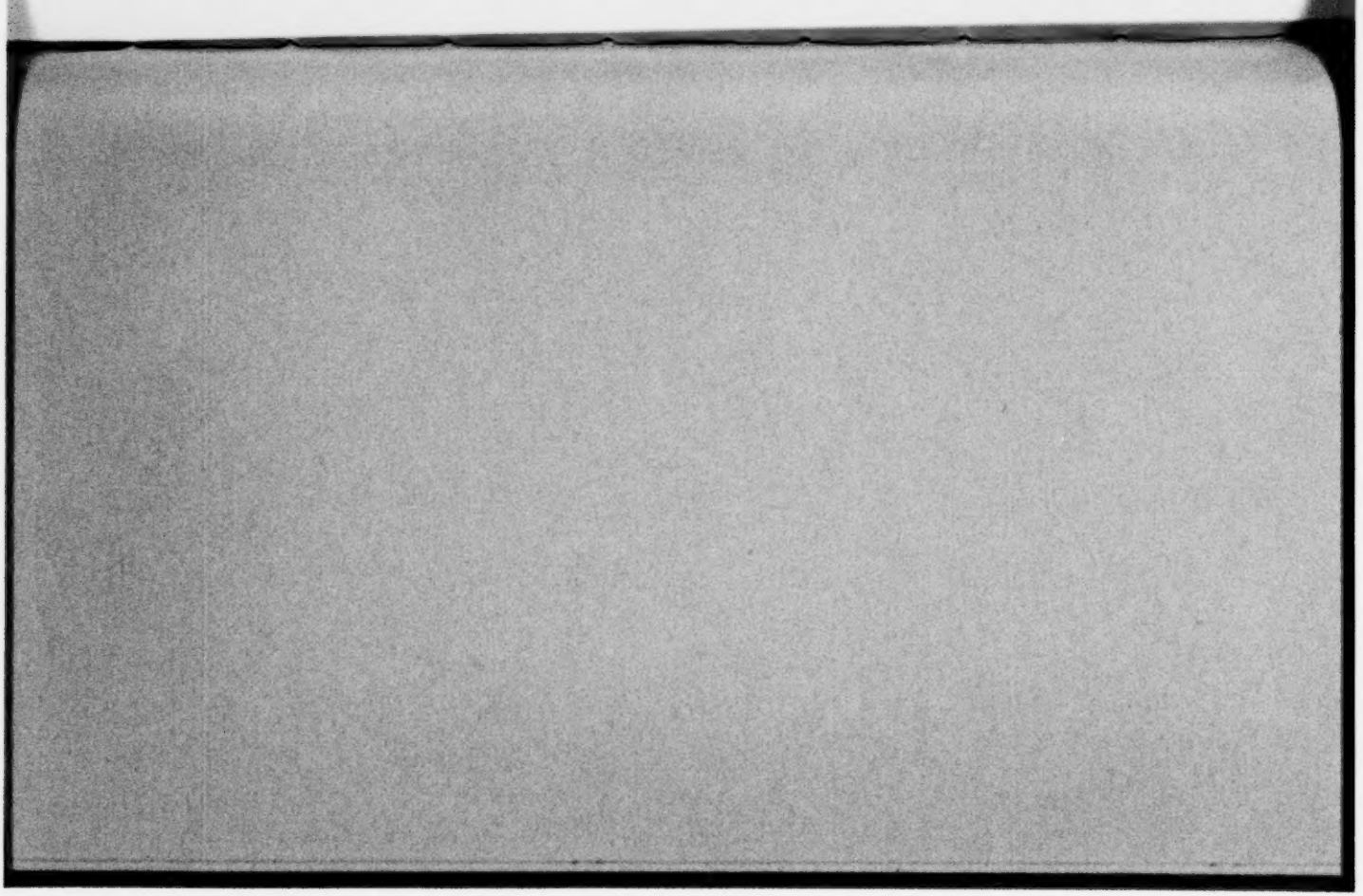

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Statutes Cited

Virginia Statutes:

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May it Please the Court:

The respondents, S. C. White, A. J. Rew, G. Walter Mapp and J. Brooks Mapp and Margaret Bell Chandler, Administrators of the Estate of John W. Chandler, in opposing the granting of writ of certiorari petitioned for, respectfully represent:

I.

In order to pass upon the various questions raised in petitioner's application for a writ of certiorari, it is necessary to correct an unintentional mistake contained in the petition, and to give a supplemental statement of the facts upon which the Circuit Court of Appeals rendered the opinion complained of.

The petition (Page 9) states that the Circuit Court of Appeals, by its decision, " - - barred petitioner's right of action (except as to one item of recovery, viz: $1,009.33) - - ". This was an unintentional error on the part of petitioner, as the Circuit Court of Appeals' decision only barred those items collected more than five years prior to the institution of this suit. (R. 241)

SUPPLEMENTAL STATEMENT OF UNDISPUTED FACTS.

On May 27, 1933, O. F. Wilde, Examiner, recommended to the Comptroller, " - - subject to the position taken by the Reserve Bank", that the Parksley National Bank re-open upon the following conditions:

> "(1) $50,000.00 unconditional voluntary cash contribution by shareholders to Surplus Fund.
>
> (2) Eliminations as scheduled by the National Bank Examiner in Exhibit 'D' of his report of examination for reorganization purposes as of April 21, 1933, such eliminations totaling $108,945.83.
>
> This will leave the bank with $60,000.00 Capital and $10,200.00 Surplus." (R. 167-169)

This recommendation was approved by the Comptroller. (R. 169)

On June 2, 1933, the Deputy Comptroller wrote White, at that time Conservator of the Parksley National Bank, agreeing to recommend re-opening upon four conditions, the two material of same being as follows:

> "(1) $50,000.00 unconditional voluntary cash contribution by shareholders to Surplus Fund.
>
> (2) Eliminations as scheduled by the National Bank Examiner in Exhibit 'D' of his report of examination for reorganization purposes as of April 21, 1933, such eliminations totaling $108,945.83." (R. 171)

There was no further written communication between White and Comptroller's Office until July 15th, 1933. The undisputed and uncontradicted evidence, however, shows that following receipt of letter of June 2, 1933, Chandler, President, White, Conservator, and Mapp, Director and Attorney, had a conference in Comptroller's Office with Chorpening, Chief Bank Examiner, the Comptroller at that time being in California. (R. 91-92) This conference was about " - - the very last of June - -". (R. 93) Chandler, White and Mapp were told to go to the Federal Reserve Bank in Richmond, that "- - they were the people who would have to furnish us the money if we reopened, and they were the people who would have to keep us open in the event there was any unusual run on the bank, and that if they agreed to reopen us and furnish us the money, it would be satisfactory with his department." (R. 93) A few days later, Chandler, White and Mapp conferred in Richmond, Virginia, with Governor Seay, of the Federal Reserve Bank. (R. 93) Present at this conference were

Governor Seay's First and Second Assistants, and the Assistant Director or Manager of the Reconstruction Finance Corporation. (R. 94) At this conference, it was agreed that if respondents put up $50,000.00 in cash, they "- - were to have all assets charged off up to that time, which amounted to between $62,000 and $63,000." (R. 94)

No-one has ever denied that the above agreement was entered into in good faith by all of the parties concerned.

Following the above agreement, respondent directors raised with considerable difficulty, and put up the $50,000.00 in cash agreed upon. (R. 95)

White, Conservator, having been present at the conference with the officials of the Federal Reserve Bank and of the Reconstruction Finance Corporation, we think it reasonable to assume, and that the assumption is fully borne out by the Record in this case, that in certifying to the Comptroller on July 15, 1933, (R. 172 A) he either paid little or no attention to that part of the certificate which stated that "- - the sum of $50,000.00 has beeen voluntarily contributed by the shareholders - -", or that he construed same as meaning that the money had been put up "voluntarily" rather than as a result of litigation. The same certification in paragraph 5 thereof stated "that the eliminations scheduled by the National Bank Examiner in his report of examination for the purposes of reorganization will be made on the assets of the Bank upon its return to its officers and directors". (R. 172 A)

One respondent director testified that he never knew of this affidavit until this suit was brought. (R. 95) There is nothing in the Record to show that the other directors knew of same.

On July 17, 1933, Seay, Governor of the Federal Reserve Bank of Richmond, (the same party with whom respondents had had the agreement above referred to) wired the bank, authorizing reopening. (R. 230)

On July 19, 1933, Governor Seay issued license to the Bank to reopen. (R. 232 C)

The Bank was opened on July 19, 1933. On that date, two statements of its resources and liabilities were entered in its books, the first showing its financial setup prior to the opening, and the second its financial setup following the opening. (R. 232 B) As will be seen from said statements, "Loans and Discounts" prior to the opening were $474,855.95, and after the opening were $412,551.11. The difference was the "eliminations" or charged off assets in question.

As will be further seen from the above referred to statement, after the opening of the Bank on July 19, 1933, the Bank had,

Capital Stock Paid In	$60,000.00
Surplus Fund	10,000.00
Undivided Profits	10,041.55
Total	$80,041.55 (R. 232 B)

The Comptroller had approved on May 27, 1933, a recommendation that the Bank be permitted to reopen with a $60,000.00 Capital and $10,200.00 Surplus. (R. 167-169)

In other words, respondent directors at the time of reopening the Bank, had added to its Capital, Surplus and Undivided Profits $9,841.55 more than had been required by the Comptroller.

Nowhere on the daily statement of July 19, 1933, of the Bank's resources after its reopening are the charged off "Loans and Discounts" aggregating $62,304.84 shown as an asset of the Bank. (R. 232 B)

White, Cashier, during the more than five and one-half intervening years between the reopening of the Bank on July 19, 1933, and its final closing on May 18, 1939, made and placed in the Bank's record daily statements showing the Bank's assets and liabilities. The Liquidator did not find the charged off assets, aggregating approximately $62,000.00 listed as assets of the Bank in any of these daily statements. (R. 85) An itemized list of the charged off assets is shown in the Record, page 165.

Following July 19, 1933, all collections by White upon the charged off items were carried on the Bank's individual ledger under the caption of "S. C. White, Special D". (R. 59) Also carried in this account were numerous collections on collateral of the face value of $30,000.00, which Chandler, President, had put up at the time the directors borrowed the $50,000.00, with which they purchased the charged off assets. (R. 87)

The charged off assets in question were found by the Liquidator in the Bank's safe, in an envelope on which was written "Reconstruction Finance Corporation". (R. 85) In the same envelope was a letter from the Reconstruction Finance Corporation to S. C. White, Cashier, written during February, 1934. (R. 85) This letter is defendants' "Exhibit A", dated February 23, 1934, (R. 229) and is as follows:

"Mr. S. C. White, Cashier,
Parksley National Bank,
Parksley,
Virginia.

Dear Mr. White:

You will undoubtedly recall our conversation on February 15th when we discussed the fact that $50,000 of rejected assets had been sold to the directors, whereas we had previously been under the impression that the $50,000 paid in by the directors had been a contribution.

The Board has amended the resolution authorizing the purchase of the Preferred Stock to allow a decrease of assets in the amount of $50,000 from that shown by the last National Bank Examiner's report.

Very truly yours,

E. W. Staples
E. R. Staples
Assistant Manager"

AHG:mcg

One of respondent directors testified that following July 19, 1933, he did not learn that there was any "- - question on the part of the Government as to the ownership of these charged off notes", until told by White, Cashier, that some question had been raised by Mr. Staples of the Reconstruction Finance Corporation. He was later shown the above referred to "Exhibit A" from Mr. Staples as Assistant Manager of the Reconstruction Finance Corporation to White, Cashier. (R. 96)

Following receipt of the above referred to letter, the directors at a meeting held November 13, 1934, had entered in their Minute Book a minute showing the purchase of the charged off assets. (R. 89)

The last and only other communication received by Bank or any of its officials from Comptroller or anyone in authority, was letter of April 28, 1936, from the Deputy Comptroller to the Board of Directors of the Bank. (R. 202-203) This letter was not answered by directors and no further demand was made by Comptroller in connection with charged off assets prior to closing of Bank approximately three years later. Upon this point, White, Cashier, testified as follows:

> "Q. Mr. White, apart from the letter that has been offered in evidence from the Comptroller, dated sometime during 1936, was any demand ever made upon you, either as director or individual, or any other way, for the payment of the money collected from these charged-off assets prior to the institution of this suit, and, if so, how long prior?
>
> A. No, sir, no demand at all. We had from two to three examinations each year from 1933 until the bank closed, and part of that time the Chief National Bank Examiner put us on a special list of examination. There was no criticism ever stated in there. I am speaking of the reports by the Examiner. There wasn't anything, whatsoever, regarding the charged-off items of 1933." (R. 135-136)

On December 16, 1937, the Bank's capital was impaired in the amount of $37,384.87. (R. 234 A) The Comptroller wrote the Board of Directors, calling their attention to the impairment and directing that proper notices be given the stockholders of same. This letter contained no reference or demand in connection with charged off assets in question. It contained this significant paragraph:

> "If the directors, or other shareholders, will voluntarily restore the capital by purchasing for cash the worthless assets, or making cash contribu-

tions sufficient to provide for the deficit, the formal notice of impairment of capital may be considered inoperative." (R. 234 A)

From the date of the Bank's reopening on July 19, 1933, until the date of its closing on May 18, 1939, all of the Bank Examiners could see from the Bank's records that the respondents were claiming the charged off assets. During this period, from two to four examinations were being made each year. (R. 141) In addition to this constructive notice, the positive, uncontradicted evidence was that all of the Bank Examiners had actual knowledge that respondent directors were claiming these assets. Upon this point, respondent Mapp testified:

"Q. Did Mr. Williams, or any other bank examiner, ever raise any question as to the ownership of these notes?

A. There never was a question raised. Every one of them knew it." (R. 97)

Respondents offered to show by Ross, one of respondent directors that he talked with Williams, Bank Examiner, "- - on several occasions with reference to these charged off notes prior to the time this money was put up, and on several occasions afterwards, in which conversations Mr. Williams admitted to him that the parties putting up this cash were entitled to these charged off notes". (R. 124)

In addition to defendant directors, there were fifteen other stockholders, who owned 14% of the Banks stock (R. 141) continuously from the reopening of the Bank until its final closing. The uncontradicted evidence was that these additional stockholders had actual knowledge of the fact that

respondents purchased the charged off assets for $50,000.00, and had this knowledge at the time of the purchase. (R. 138-139).

Two directors were elected between the reopening and final closing of the Bank, one of whom was later elected and serving as President at the time of the Bank's final closing. Neither of these directors are respondents. (R. 132-133) There was never any concealment of any records of the Bank between its reopening and final closing. Upon this point, White, Cashier, testified:

> "Q. Mr. White, did you ever at any time after July 19, 1933, conceal any records of the bank, or refuse to show any records in the bank, to any stockholder in the bank, or to any governmental officials?
>
> A. No, sir.
>
> Q. Were they at all times continuously open between July 19, 1933, and the appointment of Mr. Hamilton, as liquidator?
>
> A. Yes, sir. We tried to render them assistance, and get all the cooperation we could from all of the stockholders." (R. 141-142)

Petitioner did not insure Bank until after its reopening on July 19, 1933. An examination of Bank's statement made on that day after the reopening (R. 232 B) would have shown petitioner that charged off assets were not owned by Bank. An examination of the Bank's records on any day thereafter would have given the same information.

No fraud, intentional wrong doing, or concealment by any of respondents is alleged or proven. On the contrary,

the original complaint alleged that respondents were acting "- - under a claim of legal right - -". (R. 3)

II.

SUMMARY OF UNCONTRADICTED FACTS PROVEN AS SHOWN BY OPINION OF CIRCUIT COURT OF APPEALS.

Judge Parker, in rendering the opinion of the Circuit Court of Appeals, summarized the uncontradicted facts proven in part as follows:

> "These (the charged off assets) were charged off at the time of the reopening of the bank on July 19th; and the papers themselves were separated from the other assets of the bank by the defendant White, who kept them in an envelope to themselves and held them under claim of right for the benefit of himself and the other directors. Collections were made on these charged off assets from time to time aggregating a little in excess of $12,000, were deposited by White in a special account which he maintained in his own name as trustee and were immediately disbursed for the individual benefit of the directors, who claimed to be the rightful owners thereof.
>
> The evidence shows without contradiction that all of the stockholders of the bank knew from the beginning that the defendants were claiming to be the owners of these charged off assets, that there were fifteen stockholders of the bank other than the interested directors and that they owned 14 per cent of the bank's stock. There is evidence, also, that the fact that the directors were claiming these assets was well known from the beginning to the bank examiners who examined the bank for the Comptroller of the

Currency and for the Federal Deposit Insurance Corporation, that a representative of the Reconstruction Finance Corporation referred to it in a letter in 1934 and that the Deputy Comptroller of the Currency referred to it in a letter in 1936. Suit was not instituted to recover the assets or to challenge the right of the defendants in same, however, until January 11, 1940." (R. 238-239)

And again, in the same opinion:

"There was actual knowledge on the part of all the stockholders, including fifteen independent stockholders owning fourteen percent of the stock; and there was actual knowledge, also, on the part of the bank examiners representing the Comptroller of the Currency and the Federal Deposit Insurance Corporation. There was no fraudulent concealment or other exceptional circumstance to prevent the running of the statute; but the assets were openly taken under claim of right and pursuant to an agreement which, while it could not affect the rights of the bank as fixed by the order of the Comptroller of the Currency, was thoroughly understood, not only by the other stockholders, but also by those whose duty it was to protect the interest of depositors and other creditors, including the examiners for the Federal Deposit Insurance Corporation, which, as a guarantor of the Bank's deposits, was most vitally concerned in the preservation of its assets. Notice to all of the stockholders of a matter so intimately affecting their rights must be deemed notice to the corporation. - - - - - - - - - - . What we have here, however, is more than mere notice to the corporation. We have actual knowledge on the part of all the stockholders of the corporation who would be entitled to complain of the wrong, coupled with actual knowledge on the part of bank examiners whose duty it is to protect depositors and the public. Under such circumstances,

we think that there is no escaping the conclusion that, within the meaning of the quoted provision of section 5811 of the Code, the fraud or mistake involved in the transfer of the assets was 'discovered or by the exercise of due diligence ought to have been discovered' so as to set the statute of limitations running.

In reaching this conclusion we have not taken account of the rather significant facts that the transfer of assets was shown by the minutes of a directors' meeting as early as 1934, that a representative of the Reconstruction Finance Corporation referred to it in a letter in 1934, that the Comptroller of the Currency complained of it in a letter in 1936, and that two independent members were elected to the Board of Directors, one of whom was chosen president, some time prior to the bank's failure. - - - - - - The evidence shows beyond question that they were claiming the assets adversely, to the knowledge of the independent stockholders and the bank examiners, and it is clear that they did not fully appreciate the meaning of 'voluntary contribution'. Nothing is shown to have been said by them with respect to the charged off assets inconsistent with their adverse claim thereto." (R. 242-244)

III.

ARGUMENT

The decisive question in the instant case is whether directors of a Bank are trustees of an express trust.

A few of the earlier Federal cases hold that the directors of a Bank are trustees of an express trust. In so holding, however, they simply follow the decisions by the State Courts in their respective districts. The great majority of the State Courts, including Virginia, hold that the directors of a Bank

are not trustees of an express trust. The Federal Courts, including the Supreme Court of the United States, follow the holdings of the State Courts in their various districts.

In other words, the only conflict is in the decisions of the State Courts, and a large majority of these decisions, hold that Bank directors are not trustees of an express trust. There is no conflict in the Federal decisions, which simply follow in their various districts the holdings of the State Courts.

The few State or Federal cases following the minority rule were in nearly every instance decided many years ago. Practically all recent decisions, both State and Federal, follow the majority rule relied upon by respondents. Under the majority rule, Bank directors not being trustees of an express trust, can rely upon either a plea of the statute of limitations or a plea of laches.

Virginia follows the majority rule. In *Winston* v. *Gordon*, 115 Va. 899, Keith, President, in delivering the Court's opinion, says:

> "'In this case there is neither proof nor averment of fraud, nor of any act done designed to conceal the existence of liability, or which operated in any way upon the plaintiffs to prevent or delay the bringing of suit. We think, therefore, that the circuit court was right in saying that the statute of limitations began to run from the time the alleged wrongs, if any, were committed, but that the statute of five years, and not of three, should have been adopted by the court.'
>
> 'To recapitulate briefly: As to the statute of limitations, we are of opinion, first, that the directors of the Traders and Truckers Bank were not express

trustees, and may, therefore, plead the statute of limitations; - -'."

See also *Williams* v. *Fidelity Loan and Savings Co.*, 142 Va. 43, especially page 70.

"'As directors and officers of a national bank are mere agents of the bank to discharge the duties imposed on it and on them by law, and not trustees of an express trust as to the property of the bank but of an implied trust created by operation of law for the bank, its stockholders, and its creditors, the statutes of limitation and the doctrine of laches may be invoked in their defense.'" 9 Corpus Juris Secundum, p. 1170.

In *Cooper* v. *Hill*, 94 Fed. 582, suit was brought by the receiver of a national bank of Denver, Colorado, against the directors thereof, to compel the restoration of a trust fund which the directors had unlawfully diverted in the development of a mine. The Colorado statute of limitations was plead by the directors.

In rendering the Court's opinion, Circuit Judge Sanborn says:

"The question presented then is, are the officers of a national bank the trustees of an express trust for its creditors and stockholders, within the meaning of this rule? - - - - - - The trust with which the property of the bank is impressed in their hands arises from the law, and from their acceptance of the office they hold. It is not an express trust arising from contract or privity, but an implied or resulting trust created by the operation of the law upon their official relation to the bank. The result is that the officers of a national bank are not the trustees of an

express, but of an implied, trust for the bank and its stockholders and creditors, and statutes of limitation and the doctrine of laches may be invoked in their defense."

In *Curtis* v. *Connly*, 257 U. S. 260, suit was brought by the receiver of a National Bank against the directors for losses sustained by illegal dividends and improvident loans. The statute of limitations was plead. The receiver contended that the case was within an exception in the State statute to the effect that, where the existence of the cause of action was concealed, by actual misrepresentation of the wrong doer, time did not begin to run until actual discovery. The Supreme Court denied the claim, saying in part:

> " 'The bank of course must be charged with knowledge of what appeared upon its books. It owned them; its stockholders had a right to inspect them. *Guthrie* v. *Harkness*, 199 U. S. 148, 26 S. Ct. 4, 50 L. Ed. 130, 4 Ann. Cas. 433. Hence it would seem, as suggested by the District Judge, that so far as concerns investments of a kind that national banks are not allowed to make, the bank was chargeable with knowledge from the beginning and can file no claim upon them now. * * * Three new directors came upon the board before August 3, 1910. It is alleged unmistakably in the bill that all the directors were chargeable with notice and did in fact know that the dividends were paid out of assets and not earned and that the improper loans should be recalled. Even if otherwise the statute of limitations would not have run, which we do not imply, knowledge of the facts by the new directors was knowledge by the bank, and none the less that according to the bill they in their turn were unfaithful. It is not alleged that they conspired with the defendants whose case we are considering. They

> came to the board as the eyes of the bank. Any one of them having notice was bound to do what he could to avert or diminish the loss. Indeed the bill seeks to charge one of them for not having done his duty. Notice to an officer, in the line of his duty, was notice to the bank. A single director like a single stockholder could proceed in the courts. *Joint Stock Discount Co.* v. *Brown*, L. R. 8 Eq. 381, 403. * * * The statute of limitations must not be applied so narrowly that business men will be afraid to take directorships, and however this bill be read in its details it appears to us not to charge enough to deprive the appellees of the protection of the act.' "

In *Hughes* v. *Reed* et als, 46 Fed. Rep. (2nd Series) 435, the Court held that the period between January 10, 1922, and May 21, 1922, was a reasonable time for the discovery of past derelictions by the directors, and sustained their plea of the statute of limitations as to all losses occurring prior to May 21, 1922.

See also upon this same point:

McNair v. *Burt* et al, C. C. A. 5th Circuit decided February 7, 1934, reported in 68 Fed. Rep. (2nd Series) 814

Corsicana Nat'l Bank v. *Johnson*, 251 U. S. 68, 40 S. Ct. 82, 64 L. Ed. 141.

Where there is no applicable Federal statute of limitations, the appropriate State statute on that subject controls. *McClaine* v. *Hankin*, 197 U. S. 154.

> " - - - concealment by mere silence is not enough. There must be some trick or connivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence and the means

> of knowledge are the same thing in effect as knowledge itself." *Anderson* v. *Gailey*, 33 Fed. (2d) page 589.

In the instant case, concealment is neither alleged nor proven.

IV

QUESTIONS PRESENTED

The Questions Presented in the petition (Pages 13-21) will, for convenience of reference, be restated below, each question preceding the discussion thereof. Their order in the petition is preserved herein:

FIRST

> "If directors of a national bank, without warrant or authority, appropriate assets of the bank to their own use and benefit and remain in control of the bank's affairs until it suspends, are they estopped to plead statutes of limitations or laches in an action brought against them by the Federal Deposit Insurance Corporation as statutory receiver of the bank for the purpose of determining the ownership of the converted assets and for an accounting?"

The first case under this question relied upon by petitioner *Deitrick* v. *Greaney* (1940) 309 U. S. 190. In said case, the defendant director entered into an agreement which he knew was illegal by Federal statute. The decision was based upon this fact. In delivering its opinion, the Court said:

> "Here it is the reach of the statute making respondent's acts illegal and affording protection from them to the creditors which governs our decision."

And again in the same opinion,

> "But it is the federal statute which condemns as unlawful respondent's acts."

In the instant case, respondents were violating no Federal statute. They had a perfect right to purchase the charged off assets for $50,000.00 cash. The best evidence of this is that the Comptroller over a year later offered to sell to the directors or other shareholders other charged off assets.

The second case relied upon by petitioner under this question is *D'Oench Duhme, Inc.* v. *Federal Deposit Insurance Corporation,* No. 206, decided March 2, 1942, reported in Supreme Court Reporter of March 15, 1942, at page 676.

In the last mentioned case, the facts upon which the decision is based are totally different from those in the instant case. In *D'Oench Duhme, Inc.* v. *Federal Deposit Insurance Corporation,* as was said by Mr. Justice Jackson,

> " - - the note was a sham knowingly given to enable the bank to conceal the worthlessness of certain bonds which it has bought from the maker, a broker. This deception was not for the single day on which the note was delivered; its purpose and its effect was to operate as a continuing inducement to existing creditors and to those who might become creditors to rely on this note as a $5,000 item counting towards its solvency."

In order to continue the original deception, certain interest payments were made for the purpose of keeping the note "as live paper". As was said, too, by Mr. Justice Douglas, "It is indeed clear that at no time prior to the demand for payment did respondent know that the note was not genuine." It is equally

true that neither on the day the Federal Deposit Insurance Corporation insured the Bank in question nor on any subsequent day could the Corporation learn from an examination of the Bank's records that the note in question was spurious.

In the instant case, on the very day that petitioner insured the Parksley National Bank, an examination of its records would have shown that the charged off assets in question were not assets of the Bank. An examination of the Bank's records on any day between July 19, 1933, and its closing on May 18, 1939, would have given this same information. Not only is this true, but as was said by Mr. Justice Parker in the instant case:

> "There was actual knowledge on the part of all the stockholders, including fifteen independent stockholders owning fourteen per cent of the stock; and there was actual knowledge, also, on the part of the bank examiners representing the Comptroller of the Currency and the Federal Deposit Insurance Corporation."

D'Oench Duhme, Inc. v. *Federal Deposit Insurance Corporation,* Supra, in no way changed the long established legal principles in cases similar to the instant case. Mr. Justice Jackson says:

> "No doubt many questions as to the liability of parties to commercial paper which comes into the hands of the Corporation will best be solved by applying the local law with reference to which the makers and the insured bank presumably contracted. The Corporation would succeed only to the rights which the bank itself acquired where ordinary and good-faith commercial transactions are involved."

As was stated, too, by Mr. Justice Frankfurter, there

was "nothing in Missouri Statutes or decisions to warrant us in setting aside this ruling".

Not to sustain the Circuit Court's ruling in the instant case would be in direct conflict with the Virginia Statute of Limitation and the Virginia and Federal decisions above referred to. See Section 5818 of the Virginia Code quoted in the appendix. There are only two Virginia Statutes of Limitations applicable to this case, same being Section 5818 of the Virginia Code, supra, and Section 5810 of the Virginia Code, both of which are quoted in the appendix hereto.

The third case cited under this question is *Adams et al* v. *Clarke* (1927) 22 F. (2 d) 957. Not only is the decision in said case not in conflict with the decision by the Circuit Court in the instant case, but in *Adams et al* v. *Clarke*, the Court expressly says: "In like manner, we accept the further view that such causes of action are subject to the application of State Statutes of Limitation." In rendering its opinion, the Court cites with approval *Curtis* v. *Connly*, Supra, and *Cooper* v. *Hill*, Supra, both relied upon by respondents in the instant case. We deem it unnecessary to further comment upon *Adams et al* v. *Clarke*, Supra.

The remaining cases cited by petitioner in connection with this question simply hold that statutes of limitation do not apply to suits brought by the Government. The instant suit is neither a suit by the Government nor by " - - a corporate instrumentality" performing "- - governmental functions - -". The lending of money by a bank is not a "- - governmental function - -", within the meaning of the decisions referred to by petitioner.

SECOND

"Assuming that the Comptroller of the

> Currency and the Federal Deposit Insurance Corporation learn that directors of an insured national bank are converting its charged-off assets to their own use, do these supervising authorities have power under the law to institute suit or take other action to remedy the situation?"

In support of its contention in connection with this question, petitioner cites no authority.

Perhaps the clearest answer to petitioner's contention is the letter of April 28, 1936, (R. 202-204) from the Deputy Comptroller to the Board of Directors of the Parksley National Bank. In said letter, the Deputy Comptroller says in part as follows:

> "Your attention is called to the fact that recent banking legislation empowers the Comptroller of the Currency to publish reports of examinations if matters criticized in those examinations are not corrected within a certain time after the directors of the bank have been notified of the need for correction, and further provides for the removal of officers who continue violations of law and unsafe or unsound banking practices after receiving warning from the Comptroller to discontinue such violations and unsafe or unsound banking practices."

In addition to these general powers, as has heretofore been pointed out, the instant suit could have been brought by any one of the non-participating fifteen stockholders during the Bank's solvency, and by any creditor, including petitioner, after the Bank became insolvent. With both constructive and actual knowledge of the facts, neither the stockholders nor any creditor instituted suit.

THIRD

> "Is the Comptroller of the Currency or the Federal Deposit Insurance Corporation chargeable as a matter of law with knowledge acquired by their respective bank examiners, which knowledge is not in fact communicated to the supervising officer or agency?"

Unfortunately, none of Counsel for respondents have, or have been able to get access to the only case cited by petitioner, in connection with this question, that is, *United States* v. *Burleigh* (1940), 110 F. (2d) 793, 796. We are unable, therefore, to comment directly upon said case. In *Hughes* v. *Reed et als*, Supra, C. C. Judge McDermott, in referring to Bank Examiners says:

> "Furthermore, the National Bank Examiners, the real 'eyes of the bank,' had access to the books, repeatedly examined them, and had actual knowledge of the acts complained of.

In the instant case, the Record affirmatively shows that the Bank not only was examined twice a year as provided by Statute, but that during a part of the time between its reopening in 1933, and its final closing in 1939, it was put "- - on a list of special examinations". (R. 136). Nowhere in the Record are "improper motives" attributed to any Bank Examiner. It is to be presumed that in compliance with their official duty, they reported to the Comptroller.

In the letter hereinbefore referred to of April 28, 1936, from the Comptroller to the Board of Directors, (R. 202-204) at which time the Bank's capital was impaired, the Comptroller stated that he had been told of respondents' claim in connection with charged off assets. In spite of the fact that respondents

neither restored nor promised to restore collections on said assets, Comptroller took no action. It is naturally to be concluded, therefore, that he would have taken none during the solvency of the Bank following its reopening in 1933.

FOURTH

> "If the trial court, deciding that an issue of law is determinative of a case, excludes evidence which deals only incidentally with that phase of the case and makes no findings, should the Court of Appeals, which concludes that the case turns on an issue of fact, make its own findings and reverse with directions to enter judgment for appellant, or should it order a new trial so that the issue may be resolved after full opportunity afforded to both parties to introduce competent evidence?"

Without prolonging this brief by a detailed reference to each of the cases cited by petitioner in connection with this fourth question, in answer thereto, we deem it only necessary to call the Court's attention to the following facts as disclosed by the Record:

(a) Positive, unequivocal evidence was offered in behalf of respondents before the Jury, without objection or exception by petitioner, showing actual knowledge on the part of all of the stockholders of respondents' claim to the assets in question. (R. 137-142)

(b) As has already been pointed out in detail, the Bank Examiners likewise had continuous notice of respondents' claim. This evidence, too, was before the Jury without objection or exception. (R. 136)

(c) The Record conclusively shows that there was

not the slightest doubt in the mind of the District Court, but that the evidence offered in behalf of respondents was sufficient to sustain their defense of the Statute of Limitations. The very fact that the District Court took under advisement its ruling upon the pleas of the Statute, in itself, shows that the District Court felt that sufficient evidence had been offered and admitted in behalf of respondents in support of their plea. Not only is this true, but the District Court, in sustaining petitioner's motion for a directed verdict, stated in part as follows:

> "The jury will have to return a verdict of that. But there is the question in my mind to leave that verdict open to this extent: By closing, to say, 'Subject to the Court's later determination on the pleas of the statute of limitation." (R. 154)

If there was the slightest question in the minds of Counsel for petitioner that there was not sufficient evidence to sustain respondents' plea of the Statute of Limitations, then it was the duty of Counsel for petitioner to either except or to ask that said question be made an issue before the Jury. Counsel for petitioner did neither. In the exhaustive brief filed in behalf of petitioner in the Circuit Court of Appeals, nowhere is it suggested that there was not sufficient evidence offered and admitted to sustain respondents' defense of the Statute of Limitations. If the objection had been made, it would, in view of the evidence offered, have been without merit. After final judgment by both the District Court and the United States Circuit Court of Appeals, it is now certainly too late for petitioner to raise this question.

FIVE

Having answered the questions raised by petitioner, Counsel for respondents respectfully desire to recapitulate as follows:

(a) Can Directors of a Bank plead the Statute of Limitations? Yes. See:

Cooper v. *Hill*, supra
Winston v. *Gordon*, supra
Williams v. *Fidelity Loan & Savings Co.*, supra
Hughes v. *Reed*, supra
Curtis v. *Connly*, supra
Corsicana National Bank v. *Johnson*, supra
McNair v. *Burt*, supra
Anderson v. *Gailey*, supra

(b) Can the Statute of Limitations be plead in a chancery suit? Yes. See:

Winston v. *Gordon*, supra
Cooper v. *Hill*, supra
Hughes v. *Reed*, supra
Curtis v. *Connly*, supra
Anderson v. *Gailey*, supra

(c) When does the statute commence to run as to Directors of a Bank? At the time the act complained of is committed. See:

Winston v. *Gordon*, supra
Corsicana National Bank v. *Johnson*, supra
Hughes v. *Reed*, supra
Cooper v. *Hill*, supra
Curtis v. *Connly*, supra
McNair v. *Burt*, supra
Anderson v. *Gailey*, supra

(d) In a case of this kind, who could have brought suit before appointment of Receiver? In the event of insolvency any creditor could sue; in the event of solvency, any single

Director (there were two new Directors, one of whom was President of the Bank, and neither of whom is defendant in the instant suit), or any single stockholder could sue, and the evidence shows that 15% of the stock was owned by parties not defendants in the instant suit.

The authorities also hold that "the Comptroller had ample power to compel restitution, resignation or a receivership." See:

Winston v. *Gordon*, supra
Curtis v. *Connly*, supra
Hughes v. *Reed*, supra
McNair v. *Burt*, supra

CONCLUSION

Upon the record here presented, respondents say:

(1) That the decision of the Circuit Court of Appeals in the instant case is not in conflict with the decision of another Circuit Court of Appeals on the same matter.

(2) That the decision complained of is not in conflict with applicable local decisions in Virginia.

(3) That the decision of the Circuit Court of Appeals in the instant case was upon a question which had been passed upon many times by the Supreme Court of the United States.

(4) That the decision of the Circuit Court of Appeals was not in conflict with applicable decisions of the Supreme Court of the United States, but on the contrary, was based upon and followed those decisions.

(5) That the writ of certiorari prayed for in the petition should be accordingly denied.

Respectfully submitted,

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APPENDIX

Statutes Involved

Section 5810, Virginia Code

"Every action to recover money which is founded upon an award, or on any contract, other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say: If the case be upon any contract by writing under seal, whether made by a public officer, a fiduciary or private person within ten years; if it be upon an award or upon a contract in writing signed by the party to be charged thereby, or by his agent, but not under seal, within five years; and if it be upon any other contract express or implied within three years, unless it be an action by one partner against his co-partner for a settlement of the partnership account, or upon accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants, in either of which cases the action may be brought until the expiration of five years from the cessation of the dealings in which they are interested together, but not after; provided that the right of action against the estate of any person hereafter dying, or upon any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued; and provided further that

the limitation to an action or other proceeding for money on deposit with a bank or any person or corporation doing a banking business shall not begin to run until a request in writing be made, therefor by check, order, or otherwise."

Section 5818, Virginia Code

"Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued."